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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

Cotter Corporation (N.S.L.),

Petitioner,

v.

United States of America; Republic Services,
Inc.; Bridgeton Landfill, LLC; Allied
Services, LLC; Westlake Landfill, Inc.; Rock
Road Industries, Inc., Mallinckrodt LLC; and
EverZinc USA, Inc.,

Respondents.

Case No.

**COTTER CORPORATION (N.S.L.)’S VERIFIED PETITION FOR
PERPETUATION OF TESTIMONY OF EDWARD McGRATH**

Pursuant to Federal Rule of Civil Procedure 27, Petitioner Cotter Corporation (N.S.L.) (“Cotter”), by and through its undersigned counsel, hereby submits this Verified Petition for the Perpetuation of Testimony of Edward McGrath and in support thereof respectfully submits the following:

1. Cotter expects to be a party in an action before this Court alleging claims under the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and other claims, in which Cotter will seek contribution relating to cost recovery/performance of response actions at the Latty Avenue property in Hazelwood, Missouri (“Latty Ave.”), and will also seek contribution and/or recovery of costs incurred in connection with Cotter’s performance of investigations, removal and response actions at the West Lake Landfill Superfund Site. Cotter cannot presently bring the action or cause the action to be brought because the parties have agreed not to proceed with litigation at this point so that they may seek a negotiated resolution. The United States, Republic Services, Inc., 18500 North Allied Way, Phoenix, AZ 85054, Bridgeton Landfill, LLC, 18500 North Allied Way, Phoenix, AZ 85054, Allied Services, LLC, 18500 North Allied Way, Phoenix, AZ 85054, Westlake Landfill, Inc., 13570 St. Charles Rock Road, Bridgeton, MO 63044, Rock Road Industries, Inc., 18500 North Allied Way, Phoenix, AZ 85054, Mallinckrodt LLC, 675 McDonnell Blvd., Saint Louis, MO 63042, and EverZinc USA, Inc., 3717 National Dr. Suite 105, Raleigh, NC 27612, are expected to be adverse parties in any action that is filed.

2. Cotter seeks to take the deposition upon oral examination of Edward McGrath, who is former outside regulatory counsel for Cotter, concerning non-privileged communications with federal regulators and others about Latty Avenue, including any associated discussion of West Lake Landfill. Mr. McGrath currently resides at 8 Cove Road, Grand Lake Stream, Maine 04668 and at 206 6th Avenue, NE, St. Petersburg, Florida 33701. The testimony of Mr. McGrath is, and will be, competent, necessary, and material to Cotter’s prosecution of the expected action. The facts elicited from the deposition of Mr. McGrath will enable Cotter to demonstrate that Cotter is entitled to contribution relating to the performance of response actions

at Latty Avenue and is entitled to contribution and/or recovery of costs incurred in connection with Cotter's performance of investigations, removal and response actions at West Lake Landfill Superfund Site, as stated above.

3. The United States is a party to two relevant tolling agreements. The Ninth Tolling Agreement for Claims Under the Comprehensive Environmental Response, Compensation, and Liability Act Relating to the Latty Avenue Properties Facility, entered into by the United States and Cotter in August of 2019, states in relevant part:

The United States, on behalf of the United States Army Corps of Engineers, contends that it has a cause of action pursuant to Sections 9607(a) and 9613(g) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a) and (g)(2), and the Formerly Utilized Sites Remedial Action Program ("FUSRAP"), Pub. L. 107-117, and Pub. L. 106-60, § 611, against inter alia Cotter Corporation (N.S.L.) ("Cotter") for, inter alia, cost recovery/performance of response actions at the Latty Avenue Properties Facility, located within the North St. Louis County Superfund Sites in Hazelwood, Missouri, and Cotter contends that it has a cause of action pursuant to CERCLA, including Section 9613(f), and common law against inter alia the United States Department of Energy and its predecessors, for, inter alia, contribution relating to such cost recovery/performance of response actions at the Latty Avenue Properties Facility (the "Tolled Claims.")

4. The Tolling Agreement for Claims Under Comprehensive Environmental Response, Compensation, and Liability Act Relating to West Lake Landfill Superfund Site,

signed by the United States, Bridgeton Landfill, LLC and Cotter in April and May of 2019, states in relevant part:

The United States, on behalf of the United States Environmental Protection Agency, contends that it has a cause of action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., against Bridgeton Landfill LLC (“Bridgeton”) and Cotter Corporation (N.S.L.) (“Cotter”) (collectively, “Respondents”) for cost recovery/performance of response actions at the West Lake Landfill Superfund Site in Bridgeton, Missouri (the “Site”). Similarly, Respondents contend that they have a cause of action against the United States, on behalf of the United States Department of Energy and its predecessor entities (including, without limitation, the Atomic Energy Commission), under CERCLA for recovery of costs incurred in connection with Respondents’ performance of investigations, removal and response actions at the Site.

5. Mr. McGrath has factual knowledge of a number of issues pertaining to radioactive materials handled by Cotter at Latty Avenue and disposal of the leached barium sulfate residues (“LBSR”) in the West Lake Landfill, as well as federal regulation of same, that he acquired during the period from 1961 through the mid-1970s. Mr. McGrath served as regulatory counsel for Cotter during this time, and his testimony will include non-privileged information pertaining to Latty Avenue residues and disposal of the LBSR. The substance of Mr. McGrath’s testimony will be limited to facts, and in particular, facts relevant to claims in toxic tort litigations such as the *Strong v. Republic Services, Inc.* litigation identified in

paragraph 7 below and to the claims referenced in the two Tolling Agreements, and will not extend to legal advice or events beyond the mid-1970s.

6. The facts Cotter seeks to establish and the substance of Mr. McGrath's testimony, based on his personal knowledge, are as follows:

- Mr. McGrath represented Cotter in dealings with the Atomic Energy Commission ("AEC") regarding Cotter's Source Material License SUB-1022, which included multiple communications with representatives of the AEC. Cotter applied for this license on or about December 16, 1969. The AEC issued this license to Cotter on or about December 30, 1969. This license allowed Cotter to possess, dry, and ship source materials containing (among other elements) uranium then located at 9200 Latty Avenue, Hazelwood, MO ("Latty Ave.") to Cotter's uranium mill in Cañon City, CO. These materials included Congo raffinate, Colorado raffinate, LBSR, and miscellaneous drums.
- Although Cotter shipped certain materials to its Cañon City mill, there remained waste materials for which no utilization existed, namely the LBSR.
- Over the course of approximately two years, Cotter and Mr. McGrath communicated with the AEC about disposal of the LBSR and explored a number of options for disposal of the LBSR.
- On or about April 28, 1971, Cotter sought permission from the AEC to dispose of the LBSR at Weldon Spring Quarry. Cotter also submitted a decommissioning proposal for disposal of the LBSR at Weldon Spring

Quarry in December 1972. On or about January 24, 1973, the AEC denied Cotter's request, which was a reversal of the position it took in a 1960 invitation to bid sent to Cotter for the LBSR and other materials, in which the AEC indicated that Weldon Spring Quarry would be an option for disposing of materials that were the subject of the invitation to bid.

- In an April 1971 Decommissioning Proposal, Cotter proposed on-site burial of the LBSR at Latty Ave. Around June 1971, however, Mr. McGrath was informed that Cotter would need to provide more detail supplemental to its recently completed proposal, and it was estimated that, due to backlog, more than two years could pass before final action would be taken. Furthermore, the Chief of the Licensing Division of the AEC informed Mr. McGrath that, even after Cotter's application was ready for a decision, Cotter's on-site burial proposal would be rejected.
- From June through December 1971, Cotter made multiple inquiries with private disposal facilities concerning potential disposal of the LBSR, and received a cost estimate of over two million dollars.
- From about July to October 1973, Cotter employed B&K Construction Co. ("B&K") to dispose of the LBSR. B&K arranged to haul the LBSR to West Lake Landfill in Bridgeton, Missouri after mixing the LBSR with topsoil from the Latty Ave. site, following which the concentration of uranium in the mixture was less than .05%, rendering the uranium an "unimportant quantity" within the meaning of 10 C.F.R. § 40.13(a) that could be disposed in the West Lake Landfill.

- When Mr. McGrath met with the AEC in September 1973, he informed the AEC that Cotter was in the process of disposing of the LBSR at a landfill near Latty Ave. The AEC did not raise any objection or otherwise express disapproval.
- On or about May 10, 1974, Cotter, through Mr. McGrath, applied to the AEC to terminate its source material license SUB-1022.
- An internal AEC memorandum dated November 13, 1974 noted that readings in a radiological survey were well within the guidelines for releasing a facility for unrestricted use. On the same day, the AEC terminated Cotter's license with knowledge of the disposal in West Lake Landfill.
- Neither the AEC nor its successor (the Nuclear Regulatory Commission, with which Mr. McGrath also communicated on multiple occasions) ever issued a notice of violation or citation to Cotter in connection with the disposal of LBSR at West Lake Landfill.

7. Cotter is taking the deposition of Mr. McGrath in the case of *Strong v. Republic Services, Inc., et al.*, 17SL-CC01632-02 in the Circuit Court for St. Louis County, Missouri on December 2 and 3, 2019. For judicial economy and convenience of Mr. McGrath, Mr. McGrath should be deposed only once.

8. Cotter seeks to perpetuate Mr. McGrath's testimony because Mr. McGrath is of advanced age and potentially the only remaining percipient witness, thus necessitating his deposition for all matters involving the parties hereto and raising a legitimate concern of possible death or incapacitating illness.

WHEREFORE, Cotter attests under penalty of perjury to the truth and accuracy of the foregoing facts and requests that the Court grant this Petition for Perpetuation of Testimony of Edward McGrath and issue an Order directing oral examination of Edward McGrath before a person designated by the Court, at such time and place and on such notice to the parties in interest as the Court may direct.

Dated: October 14, 2019

Respectfully submitted,

/s/ J. Yasmin Tayyab

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